

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01586

**ANGELA HUMPHRIES and
KEVIN FROMME**

APPELLANTS

V.

**PEARLWOOD APARTMENTS PARTNERSHIP,
a Mississippi Limited Partnership,
CALHOUN DEVELOPMENT, INC., MAC-RE, LLC,
CALHOUN PROPERTY MANAGEMENT, INC.**

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT OF RANKIN, MISSISSIPPI
(CIVIL ACTION NO. 2006-49-C)**

BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Angela Humphries and Kevin Fromme, Appellants;
2. James D. Bell and the law firm of Bell & Associates, P.A., attorney for Appellant;
3. Pearlwood Apartments Partnership and MAC-RE, LLC, Appellee;
4. Kelley Berry, law firm of Berry & Munn, P.A., 336 West Gallatin Street, Hazlehurst, Mississippi 39083, Attorney for Appellee
5. Honorable William E. Chapman, III, Rankin County Circuit Court Judge, Post Office Box 1885, Brandon, Mississippi 39043

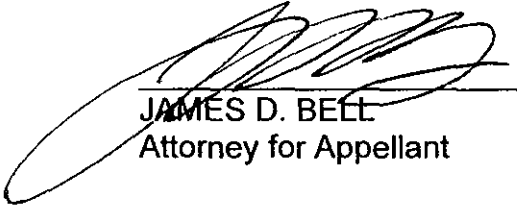

JAMES D. BELL
Attorney for Appellant

TABLE OF CONTENTS

Page(s)

I.	CERTIFICATE OF INTERESTED PERSONS.....	i
II.	TABLE OF AUTHORITIES.....	iii
III.	STATEMENT OF THE ISSUE.....	1
IV.	STATEMENT OF THE FACTS.....	2-3
V.	ASSIGNMENT OF ERROR.....	3
VI.	STANDARD OF REVIEW.....	3
VII.	ARGUMENT.....	4-8
VII.	CONCLUSION.....	8
VIII.	CERTIFICATE OF SERVICE.....	9

TABLE OF AUTHORITIES

CASE LAW

<i>Hicks v. North American Co. for Life and Health Ins.</i> , 2008-CA-01364-COA (Miss. 2010).....	3
<i>Pierce v. Cook</i> , 992 So.2d 612, 619 (Miss. 2008).....	5,6
<i>Robertson v. Chateau LeGrand Property Owner's Association, Inc.</i> , 2008-CA-0053- COA.....	7

MISSISSIPPI STATUTES

Miss. Code Ann. § 15-1-49	2,4,5,8
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STATEMENT OF THE ISSUES

- 1. The lower court erred when it granted the Defendants' Motion for Summary Judgment on the ground of the three year statute of limitations.**

STATEMENT OF FACTS

This case arises out of a suit brought by Angela Humphries and Kevin Fromme, the Appellants herein, against Pearlwood Apartments Partnership and MAC-RE, LLC for damages as a result of repeated flooding to their home which was located “down stream” from the Pearlwood Apartments in Pearl, Mississippi, and which are alleged to have been caused by the negligent disruption of the natural flow of rain water from the apartment complex (R. 12). Angela and Kevin filed their Complaint on February 23, 2006, and thereafter the Appellees (hereinafter jointly referred to as “Pearlwood”) filed separate answers on June 8, 2005 (R. 21 – 28). Pearlwood Apartments Partnership owns the Pearlwood Apartments, and MAC-RE, LLC manages the complex (R.157).

After discovery was completed, Pearlwood filed on February 17, 2009 their Motion for Summary Judgment predicated on the statute of limitations contained in Miss. Code Ann. § 15-1-49 (R. 68), and simultaneously filed separate motions to amend their answers in order to add the statute of limitations defense (R. 94,105). Angela and Kevin filed their Response to the Motion for Summary Judgment on March 20, 2009 (R.118), followed by Pearlwood’s Rebuttal (R.122) on March 30, 2009. Angela and Kevin filed their Additional Response to the Motion for Summary Judgment on June 15, 2009 (R132), their Second Additional Response on June 18, 2009 (R.150), and finally Pearlwood filed their Supplemental Rebuttal to the Additional Responses on July 16, 2009 (R. 175).

During the various filings concerning the request for summary judgment, Angela and Kevin also filed a Motion on June 12, 2009 to amend their complaint to detail with

greater specificity the ongoing flooding to their property, but this Motion was never ruled upon. On June 17, 2009 the Court granted Pearlwood's Motions to amend their answers to include the statute of limitations defense (R.148), which amended answers were filed on June 22, 2009 (R.164, 168).

On July 16, 2009 Pearlwood filed their opposition to Angela and Kevin's request to amend the Complaint (R. 172), but the Court, without addressing the requested amendment, entered its Order granting summary judgment on August 3, 2009 (R. 179). The Court thereafter denied Angela and Kevin's Motion to Reconsider (R.180, 191) on September 8, 2009, thus prompting the appeal herein.

ASSIGNMENT OF ERROR

THE LOWER COURT ERRED WHEN IT GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND OF THE THREE YEAR STATUTE OF LIMITATIONS.

STANDARD OF REVIEW

This Court applies a de novo standard of review to a grant of summary judgment by the trial court. *Hicks v. North American Co. for Life and Health Ins.*, 2008-CA-01364-COA (Miss. 2010), citing *Hudson v. Courtesy Motors, Inc.*, 794 So.2d 999, 1002 (Miss. 2001). The Court in *Hicks* further stated:

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). "The evidence must be viewed in the light most favorable to the party against whom the motion has been made." *Northern Elec. Co. v. Phillips*, 660 So.2d 1278, 1281 (Miss. 1995).

Hicks, at ¶ 8.

ARGUMENT

The issue before this Court is whether the three year statute of limitations of Miss. Code Ann. § 15-1-49 precludes Angela and Kevin from prosecuting their Complaint for repeated instances of flooding of their home, alleged to be caused by the continuing negligence of Pearlwood, where more than three years passed from the time of the first instance of flooding known or suspected by Angela and Kevin to be caused by Pearlwood to the time of filing of suit but less than three years from subsequent episodes.

Pearlwood argued in the lower court that Angela and Kevin knew in October of 2002, of the flooding of their home with water coming down-hill from the Pearlwood Apartments; that more than three years elapsed until suit was filed in February of 2006; and that therefore their claim was time-barred (R. 68). However, Angela and Kevin's Complaint made clear the suit was for "repeated flooding" and that the drainage caused by the negligence of the Defendants "now flows into the home of the Plaintiffs" (R. 13). In addition, Kevin's deposition testimony showed that after purchasing their house the flooding began in October of 2002, and then flooded numerous times up through and including March of 2003, and thereafter (R.118), which was within three years of filing suit. Kevin further provided an affidavit (R. 143) on June 12, 2009, that the flooding "continues to this day" and attached pictures of flooding coming from the apartment complex retention pond in April or May of 2003 (R144 – 147, 158).

Finally, the City of Pearl's Public Works Director sent at least three separate letters to Pearlwood (R. 182-184), produced by Pearlwood in discovery (R.160), demanding that they take action to alleviate drainage from their apartment complex

premises to Angela and Kevin's home at 132 Leland Street, including re-working the retention pond and cleaning out the storm drain and curb inlets. The second letter (R. 183), dated February 27, 2003, advised that the retention pond was still not working properly and that the storm drain needed to be cleaned of debris (suit was filed less than three years afterward on February 23, 2006). The third letter of March 7, 2003, (R.184) advised that their house at 132 Leland Street flooded once again on March 5, 2003, noting that the curb inlets were surcharging water and the retention pond was not functioning at all, and demanding that they let the City of Pearl know their intentions on addressing "this problem". Still, not until almost two months later in May of 2003, did Pearlwood take action to clean out the catch basins and inlets and work on the retention pond (R.158).

Pearlwood's position before the lower court was that once Angela and Kevin missed the three year mark with respect to the earliest flooding of approximately October of 2003, they had no remedy for repeated acts of flooding occurring thereafter (R.123). However, Angela and Kevin believe that the repeated acts of flooding of their home of which they have complained in their lower court suit constitute continuing torts as a result of repeated acts of unlawful conduct by Pearlwood, thus tolling the three year statute of limitations of Miss. Code Ann. §15-1-49. Pearlwood's argument that repeated acts of flooding relate back to the earliest flooding for purposes of being time-barred ignores the law concerning continuing torts, and attempts to immunize their negligent conduct which occurred within three years of filing suit and thereafter.

The Mississippi Supreme Court has recently addressed the law of continuing torts in *Pierce v. Cook*, 992 So.2d 612, 619 (Miss. 2008), in which the Court stated:

We previously have defined the continuing tort doctrine as follows:

[W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious acts cease. Where the tortious act has been completed, or the tortious acts have ceased, the period of limitations will not be extended on the ground of a continuing wrong.

A "continuing tort" is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. *A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation.*

Stevens v. Lake, 615 So.2d 1177 (Miss. 1993) (emphasis in original) (quoting C.J.S. Limitations of Actions § 177 at 230-31 (1987)). A few years after *Stevens*, we again addressed the continuing tort doctrine in *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144 (Miss.1998). Addressing our decision in *Stevens*, we stated:

Indeed, we opined that continuing or repeated injuries can give rise to liability even if they persist outside the time period for the initial injury, but we noted that the defendant must commit repeated acts of wrongful conduct. *Stevens*, 615 So.2d at 1183 (citing *Hendrix v. City of Yazoo City*, 911 F.2d 1102 (5th Cir.1990)). We have held that we will not apply the continuing tort doctrine when harm reverberates from one wrongful act or omission. *Id* (emphasis added)

Smith, 726 So.2d at 148-49 (Miss.1998).

Clearly, as noted above, this Court has previously recognized that repeated acts of wrongful conduct in the context of the continuing tort doctrine can be both acts of commission and acts of omission. Here, Pearlwood had an affirmative duty to properly maintain their retention pond, and the storm drain and curb inlets leading to the pond, so that water didn't flood Kevin and Angel's home downhill. They repeatedly failed to maintain the retention pond in proper working order and failed to keep the storm drain and inlets cleaned of debris, resulting in the house being flooded again in March of 2003 (R.184). Even after they belatedly made repairs to the pond in May of 2003 (after

being contacted by the City three different times) and cleaned out the catch basins and inlets (R.158), the pond still failed to work properly and the home continued to be flooded (R. 143). This repeated damage to Angela and Kevin's home did not result from one "wrongful act or omission", but by repeated and continued tortious conduct, and the Complaint filed in this matter in February of 2006 is timely under the continuing tort doctrine.

More recently, the Mississippi Court of Appeals considered the continuing tort doctrine in *Robertson v. Chateau LeGrand Property Owner's Association, Inc.*, 2008-CA-0053-COA:

In determining when the statute of limitations began to run in this matter, we note the following:

In the case of a continuing trespass, the statute of limitations does not begin to run from the date of the original wrong, but rather gives rise to successive causes of action each time there is an interference with a person's property. Thus, if there are multiple acts of trespass, then there are multiple causes of action, and the statute of limitations begins to run anew with each act.

54 C.J.S. *Limitations of Actions* § 202 (2008). Therefore, each time the Association rented out Robertson's unit or went into Robertson's unit without his consent or knowledge, a new cause of action was created.

Id. ¶ 24.

In the case at hand, the repeated flooding of Angela and Kevin's home was caused by the continued wrongful conduct of Pearlwood in negligently failing to perform proper repairs to the retention pond to prevent overflow and related maintenance to the curb inlets, as a result of which flooding continues to occur (as most recently noted in Kevin's deposition of January 27, 2009, (R.120, 121) in which he told counsel for Pearlwood that they both watched the flooding the day before). Kevin and Angela filed their suit in

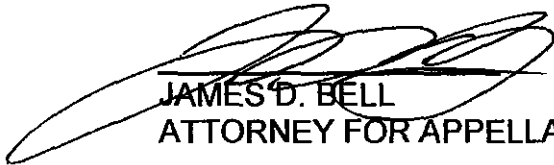
CERTIFICATE OF SERVICE

I, James D. Bell, do hereby certify that I have caused to be mailed, via United States mail, a true and correct copy of the foregoing instrument to:

**Kelley Berry, Esquire
Berry & Munn, P.A.
336 West Gallatin Street
Hazlehurst, Mississippi 39083**

**Honorable William E. Chapman, III,
Rankin County Circuit Court Judge
Post Office Box 1885
Brandon, Mississippi 39043**

SO CERTIFIED, this, the 25 day of January, 2010.


JAMES D. BELL
ATTORNEY FOR APPELLANT

this matter within three years of the March, 2003 flooding and the negligent performance of the May, 2003 repair work and accordingly, this action should not have been dismissed.

CONCLUSION

Kevin and Angela respectfully submit that the three year statute of limitations of Miss. Code Ann. 15-1-49 is controlled by the continuing tort doctrine, and that for the reasons set forth herein the suit filed in the lower court in February of 2006, was filed timely. This matter should be reversed, and Kevin and Angela should be permitted to proceed with their cause of action.

Respectfully submitted,
ANGELA HUMPHRIES AND KEVIN FROMME

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